

# Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?\*

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The 2010 Iowa judicial elections were, as former Arkansas Governor Mike Huckabee said soon after, of an “historic nature,” likely “one that . . . will give legs to a larger movement over the next few years.”<sup>1</sup> The election he referred to, in which Iowans voted against retention of three justices who had participated in their Supreme Court’s unanimous decision to uphold gay marriage, surely is one of the most significant judicial elections ever. It also was the highest-visibility judicial election since 1986, when Californians voted down the retention of Chief Justice Rose Bird and two of her colleagues.<sup>2</sup>

Even before election day, the 2010 judicial election cycle was unique: never before had so many states had organized opposition to a justice up for retention—this time, six states.<sup>3</sup> Although only in Iowa was the opposition intense and ultimately successful, the widespread efforts and the result in Iowa may well open a new era of heat in judicial elections of all types—retention-only as well as partisan and nonpartisan.

Notably, though, in the five states other than Iowa with opposition to judges in 2010, there was less support for retention, on average, than had been the case from 1998 to 2008. Support also declined even in states without organized opposition to retention.<sup>4</sup>

Unlike the impact of the 1986 California event, which had occurred because of Bird’s consistent reversal of scores of capital cases and had little if any ripple effects, this time several specific reasons point toward more challenges to incumbent judges. Not only are more contests likely, but well-informed observers fear that judges’ actions on the bench may reflect increased concern with possible public reactions to decisions.

In the remainder of this article, I will place the Iowa retention-election contests into context regarding how judges are selected, focusing on recent changes. I will then review what happened during the Iowa election itself. With that background in place, I will offer some personal opinions—first, regarding the Iowa campaign itself; next, regarding the likely impact of the Iowa election and its result; and last, regarding steps that might be taken to reduce the likelihood of more attacks on judges.

## SOME CONTEXT ON JUDICIAL ELECTIONS

Of all state appellate judges and general-jurisdiction trial judges, 89% face some type of election.<sup>5</sup> Facing retention-only elections are 42% of appellate judges and 19% of general-jurisdiction trial judges; facing nonpartisan elections, 20% of appel-

*Author’s Note:* To a number of Iowans and others, I am immeasurably indebted for their wisdom, information, and dedication to shared values in protecting and promoting our constitutional order and the rule of law.

### Footnotes

\* For James Madison’s memorable treatment in the *Federalist Papers* of the dangers in the “tyranny of [the people’s] own passions,” see note 28 *infra*.

1. Mike Glover, *Huckabee Says Ousting of Iowa Judges Historic Move*, Associated Press, Nov. 22, 2010. Huckabee was “in Des Moines courting evangelical conservatives . . .” *Id.* Huckabee was not the only leading Republican to speak out in support of the electoral majority shortly after the vote. Newt Gingrich, also campaigning in Iowa at that time, said that the four justices who had not been on the ballot should resign. Kathie Obradovich, *Gingrich: Remaining Iowa Justices Should Resign*, DES MOINES REGISTER online commentary, Nov. 16, 2010, available at <http://blogs.desmoinesregister.com/dmr/index.php/2010/11/16/gingrich-remaining-iowa-justices-should-resign/>. Two other Republicans with a national profile also supported the “message being sent” by the Iowa voters—Congresswoman Michelle Bachman and former Senator Rick Santorum; both spoke on C-Span, one in a broadcast talk and the other in an interview. See Amy Gardner, *Pairing Religious with Fiscal Sets Iowa Tea Party Apart*, WASHINGTON POST, Feb. 3, 2011, p. A3.

Meanwhile, the president of the American Bar Association, Stephen N. Zack, wrote an op-ed for the *Des Moines Register* urging that we protect courts from intimidation. Stephen N. Zack, *Warning Bells in Midwest: Protect Courts from Intimidation*, DES

MOINES REGISTER, Nov. 24, 2010. And the president of the New York City Bar Association, Samuel W. Seymour, said that “[w]hen a judge suffers an electoral defeat because he or she exercised judicial independence, we all suffer.” Letter to the Editor, N.Y. TIMES, Nov. 7, 2010 (available on Westlaw at 2010 WLNR 2229693). A *Washington Post* editorial argued that merit-selection systems “would better shield judges from the most corrosive aspects of political elections” and that judges “should not be swayed by the political whims of the day.” *Firing Judges*, WASHINGTON POST, Nov. 5, 2010, p. A20.

2. See ABA TASK FORCE ON LAWYERS’ POLITICAL CONTRIBUTIONS, REPORT AND RECOMMENDATIONS (Part 2), 5 (1998) (“ABA TASK FORCE REPORT”). On that contest’s unprecedented campaign spending, see Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1406-07 (2003).

3. See A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions*, N.Y. TIMES, Sept. 25, 2010, p. A1. The significance of this movement in 2010 is shown by the *New York Times*’ decision to run an article about it on the paper’s front page.

In the past, organized opposition to justices in even two states in one year had occurred only twice. In 1986, organized opposition succeeded in California (see note 2 *supra*); also, one Nebraska justice faced some organized opposition. In 1996, a Nebraska justice was denied retention; he had authored a unanimous opinion invalidating a term-limits law and was opposed by a national organization that spent an estimated \$200,000 (no disclosure was required or given). That same year, Tennessee Supreme Court Justice Penny White, the first to face a retention election there,

late judges and 41% of general-jurisdiction trial judges; and facing partisan elections for initial terms, 33% of appellate judges and 38% of general-jurisdiction trial judges.<sup>6</sup> Unlike the system of appointing federal judges, unchanged since 1789, judicial selection in the states is not only varied but also has been subject to frequent controversy and change since the early 19th century. The states started with appointment systems, but in the early 19th century many replaced appointments with partisan elections; then during several decades around 1900 many states went to nonpartisan elections; and from 1940 to the end of the 1980s many turned to “merit” systems, with screening committees sending nominations to the appointers and the appointed judges subsequently facing the voters for retention or rejection.<sup>7</sup>

For present purposes, we must pay special attention to developments beginning in the 1970s. Judicial elections, whatever the system, for generations were almost always as unexciting as “checkers by mail.”<sup>8</sup> The first notable change occurred in 1978 in Los Angeles County: because of rulings by some trial judges appointed by then-Governor Jerry Brown, the deputy district attorneys early in that election year literally ran an ad in the daily legal newspaper offering to support anyone who would challenge an unchallenged incumbent judge. That effort produced elections lively enough that some changes followed: e.g., judges increased their appearances at community affairs, issued “state of the court” reports, and invited jurors to visit chambers after a case.<sup>9</sup>

Over the next decade in Texas, unprecedented campaign spending occurred as part of the battle between plaintiffs and

defense lawyers over the conduct of tort litigation. After several Texas elections, the defense side had won that contest and spending shrunk to minor sums there. But similar big-spending contests occurred in several other states, peaking in 2000 when the national total spent by high-court candidates rose 61% over 1998; in addition, interest groups’ “independent spending” hit at least \$16 million that year, far more than ever before.<sup>10</sup> Since 2000, although the total sums spent nationally have fallen, in inflation-adjusted terms, from the peak spending in 2000, more and more individual states have set new records for judicial campaign spending. Obviously, the era of quiet judicial elections has ended, replaced by contests that were “nastier, noisier, and costlier.”<sup>11</sup>

But significant additional change started in 2004 in Missouri, which has been famous since 1940 for being the first state to adopt a “merit” system. In 2004, for the first time in decades, a Missouri justice faced organized opposition to his retention. Several groups were active against the justice, using methods like robocalls with a message from Phyllis Schlafly.<sup>12</sup> The justice won but the lesson was rich, though it drew almost no attention: while the opposition’s grassroots believed the contest was all about that justice and/or sending a message to judges generally, savvy observers believed that the opposition leaders’ actual aim was to increase total turnout of anti-judge

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lost after attacks on her having joined a decision that overturned a capital sentence, an attack that was a façade in order to open a vacancy for a new appointment. After she was denied retention, the state’s governor was asked, “Should a judge look over his shoulder [when making decisions] about whether they’re going to be thrown out of office?” “I hope so,” he answered. See David B. Frohnmayer, *Who’s to Judge?*, 58 OR. ST. B. BULL. 9 (1997). See ABA TASK FORCE REPORT, note 2 *supra*, at 6 (1998); on the Tennessee events, see also Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1240 n. 48 (2008).

As for the five states other than Iowa with organized opposition in 2010:

Alaska Justice Dana Fabe won retention with 55% of the votes despite the opposition of the Alaska “political arm of the anti-abortion, pro-traditional marriage Alaska Family Council,” with funding mainly from the “national Christian group Focus on the Family.” *Voters Retain Fabe as Alaska Supreme Court Justice*, ANCHORAGE DAILY NEWS, Nov. 3, 2010 (available on Westlaw at 2010 WLNR 21953342).

Three Colorado justices were opposed by Clear the Bench Colorado “for [partisan] rulings on taxes and fees, congressional redistricting and eminent domain.” Felisa Cardona, *The Colorado Vote: Judges Retention: Three on Supreme Court Face Effort to Remove Them*, DENVER POST, Nov. 3, 2010 (available on Westlaw at 2010 WLNR 21986437). The Colorado Attorney General, a Republican, had spoken against the three to a Republican club, see Lynn Bartels, *AG Regrets Court Remark: A Blog Says Suthers Told a*

*GOP Club He Won’t Vote for Three State Justices*, DENVER POST, Jan. 19, 2010 (available on Westlaw at 2010 WLNR 1152505). They won with 59%, 60%, and 62%. These percentages and the others in this footnote are from William Raftery, National Center for State Courts, NOV. 2 JUDICIAL ELECTIONS ROUNDUP, available at <http://www.ncsc.org/Conferences-and-Events/Nov-2-Judicial-Elections-Roundup.aspx>.

In Florida, Justices Jorge Labarga and James E.C. Perry were opposed but both won, Labarga by “the lowest approval in state history although that was still 58.9%” and Perry by 61.7%. “With little or no funding, several single-issue activist groups influenced a statewide election that normally attracts little interest—and that’s troubling to those who believe it marks the beginning of a movement that could shake the foundation of the judiciary. . . .” The opposition to the Florida justices “focused on one issue”: they had joined three other justices in keeping off the ballot a GOP-backed “measure designed to derail federal health care legislation”; the court had found the ballot language confusing. A 29-second video posted on YouTube.com, using photos of the justices, said, “Vote out the Obamacare supporters. They voted against us. Now we can vote against them.” The ad was made by a doctor and the executive director of Florida’s chapter of Ron Paul’s Campaign for Liberty. Another ad similarly posted, by the Florida Tenth Amendment Center, urged defeating the two who had denied voters “the right to vote on health care freedom.” Jane Musgrave, *Florida Judges May Be on Political Hotseat*, PALM BEACH POST, Nov. 13, 2010, available at <http://www.palmbeachpost.com/news/state/florida-judges-may-be-on-political-hot-seat-1045961.html?printArticle=y>.

**The campaign spending against the justices totaled almost \$1 million, including more than \$900,000 from three out-of-state organizations . . . .**

people, hoping their votes would help win several *nonjudicial* races. And in 2006, again in Missouri, the voters defeated a trial judge in Cole County (home of the state capital, Jefferson City—about two-thirds of Missouri’s trial judges face contestable partisan elections); the judge had been challenged because a campaign consultant deemed that judge the most vulnera-

ble of several up for reelection; the consultant had found funding from an out-of-state deep-pocket judge-hater.<sup>13</sup>

While 2010 campaigns were particularly difficult for incumbents generally, not merely judges, for years hostility to courts has been active and rising. The 2010 judicial elections took us to a new stage, described with unusual clarity, depth, and conciseness by South Dakota’s Chief Justice David Gilbertson:

. . . I think events have taken an ominous turn for the worse. For several years expensive and sometimes nasty judicial elections have gone on. However they appear to me to be mostly . . . the trial lawyers and unions vs. the chamber of commerce and insurance companies. They were wallet driven. Now the issue has changed to issues concerning personal beliefs and lifestyles. [T]he recent results in Iowa show a new anti-judicial force which is . . . able to portray itself as

the defender of values and rights instead of the judiciary.<sup>14</sup>

#### WHAT HAPPENED IN IOWA

We turn now to the 2010 Iowa election. For starters, a blog posting shortly after the election by a Dr. Richard G. Lee provides a must-read account about the opposition’s start with seed money from Newt Gingrich, the opposition’s organization, and its activities (plus discussion of several alleged missteps by supporters of the justices).<sup>15</sup> Several knowledgeable Iowans, though not all agreed on every alleged fact in that posting, do agree that it is generally a full and fascinating picture.

In April 2009, a unanimous Iowa Supreme Court decision had struck down Iowa’s 1998 Defense of Marriage Act in a suit brought in 2005 by six gay couples who had been denied marriage licenses.<sup>16</sup> (The trial judge, who also had ruled for the plaintiffs, won retention in the 2010 election.) Turnout was Iowa’s highest in any non-presidential year, and the votes cast on retention set a record for Iowa and were near the highest in any state ever. Normally only a bit more than 60% of Iowa voters would cast a ballot on whether to retain a justice, but 88% did so in 2010.<sup>17</sup> The justices won only 46% for retention. In Iowa’s prior 1,322 retention votes, four trial judges had lost (otherwise, trial judges had won with majorities ranging from about 55% to about 75%) but no appellate judges had lost; appellate judges had averaged more than 70% voting for retention in all but two elections: 2000 and 2006.

The campaign spending against the justices totaled almost

In Illinois, Justice Thomas Kilbride (who won with 66%) was involved in the only big-money retention contest, with about \$2.5 million spent by his supporters (“plaintiffs’ lawyers, unions and other interests channeling money through the Illinois Democratic Party, which has an obvious stake in how the . . . court comes down in future legal battles over redistricting”), and about \$650,000 by his opponents (including “\$150,000 from the U.S. Chamber of Commerce, \$180,000 from a group closely aligned with the National Association of Manufacturers and nearly \$90,000 from the American Tort Reform Association”). Editorial, *Judges and Money*, N.Y. TIMES, Oct. 30, 2010 (available on Westlaw at 2010 WL 21691000). That court has some history of unusually partisan action in reviewing redistricting, see Jackson Williams, *Irreconcilable Principles: Law, Politics, and the Illinois Supreme Court*, 18 N. ILL. U. L. REV. 267, 290-91 (1998), and *People ex. rel. Burris v. Ryan*, 634 N.E.2d 1066, 1067-68 (Ill. 1994) (Harrison, J., dissenting) (charging colleague with changing his vote in a redistricting case after deciding to change parties).

Kilbride, who became chief justice after the election, said this: “If we are going to allow the courts to be politicized to this degree . . . it’s going to ruin the court system. We might as well shut down the third branch.” John Gramlich, *Judges’ Battles Signal a New Era for Retention Elections*, WASH. POST, Dec. 5, 2010, p. A8 (available on Westlaw at 2010 WLNR 25819195).

In Kansas, most notable was a full-page ad run in support of the four justices up for retention: “Kansas Wins With a Fair and Impartial Judiciary,” naming the justices, with brief text noting that they had “passed the demanding review of the independent Kansas Commission on Judicial Performance. See the

Commission’s positive reviews at [the Commission’s website]. Be informed before you go to the polls.” The ad opened with, “We urge you to vote to retain,” with photographs of three supporters of the justices: the current governor, a former governor, and former United States Senator Nancy Landon Kassebaum. The ad ran in the *Wichita Eagle* and the *Topeka Capitol-Journal* and is on the web at <http://www.justiceforkansasinc.com/media-room>.

Important in evaluating (and for adapting) that Kansas ad is that brief as was its text, it referred explicitly to the “positive reviews” about the justices by the official, independent Commission on Judicial Performance (established in 2006).

4. The six states with organized opposition saw these declines in the percentage vote for retention: Iowa 27%-28%, Illinois 13%, Colorado 10%-13%, Kansas 6%-7%, Florida 6%-9%, and Alaska 7%. Data on these retention elections are from the new and wonderfully exhaustive work by Dr. Albert Klumpp (correspondence with author, February 2011).
5. Data as of 2004 compiled by National Center for State Courts, see Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L. J. 1077, 1104 (2007).
6. *Id.*
7. From 1940 to 1967, ballot propositions to move to “merit” won in seven states; from 1969 through 1977, there were seven more victories for merit selection and four defeats; since 1978, there have been six victories and nine defeats, with a two-victory, six-defeat score for merit selection from 1987 to date. See AMERICAN JUDICATURE SOCIETY, CHRONOLOGY OF SUCCESSFUL AND UNSUCCESSFUL MERIT SELECTION BALLOT MEASURES, available at [http://www.judicialselection.us/uploads/documents/Merit\\_selection\\_](http://www.judicialselection.us/uploads/documents/Merit_selection_)

\$1 million, including more than \$900,000 from three out-of-state organizations: the National Organization for Marriage based in Washington, D.C.; the American Family Association's AFA Action, Inc. of Tupelo, Mississippi; and the Campaign for Working Families PAC of Arlington, Virginia. The main in-state sum spent against the justices was \$10,178, by the Iowa Family Policy Center ACTION.<sup>18</sup>

A similar retention contest occurred in Nebraska in 1996, when out-of-state funds flooded in to defeat one justice who had written the opinion in a unanimous decision striking down Nebraska's term-limits statute.<sup>19</sup>

Opposition to the justices was led by Bob Vander Plaats, who had lost two Republican gubernatorial primaries and one for lieutenant governor. After losing in a 2010 primary, he put his full-time effort into the anti-retention campaign. Although the opposition funding was almost all from outside Iowa, unquestionably there was a great deal of active local support; for example, one of Iowa's congressmen led a bus tour around the state.<sup>20</sup> One other important aspect of the Iowa opposition was that "more than 200 churches" actively participated in the opposition.<sup>21</sup>

For the justices, \$423,767 raised entirely in Iowa was spent by the Iowa-based Fair Courts for Us Committee.<sup>22</sup> That was one of three groups supporting retention, but "Justice Not Politics" and "Iowans for Fair Courts" did not spend on direct advocacy but only on educational efforts. The group called Justice Not Politics also spent about \$8,000 on such efforts.

The one radio spot supporting the justices is worth noting: "[Background noise of sports official's whistling and

stadium crowd stirring:]

"[Voice 1:] And the flags are flying! Looks like a questionable call. I think we are going to see some fans calling for these referees' jobs.

"[Voice 2:] Listen, we will never agree to every call, but you should not fire the good referees on just one call. The same is true of the Iowa Supreme Court. I am Bob Ray, Republican and former Iowa Governor. The Iowa Supreme Court has been making solid judgments over the years. The Court protected Iowa families by requiring convicted sex offenders to live at least 2,000 ft. away from a school or child care center; protected Iowa seniors and protected our individual property rights. Please join me, Bob Ray, in turning over the ballot and voting yes, yes, yes, to retain the Iowa Supreme Court. There's enough politics out there and we don't need it in our courts.

"Paid for by Fair Courts for Us."<sup>23</sup>

Views of that ad's effectiveness were divided both before it ran and after, some people feeling that it branded or came too close to branding the *Varnum* decision a "bad call."<sup>24</sup> The ad was aired enough to consume most of the funds supporting the justices.

From outside Iowa, the justices got no help except for a visit

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On the past 105 years' glacial progress (which if continued will need another 160 years to end contestable elections for appellate judges and 770 years for trial judges), see Roy A. Schotland, *Introduction: Personal Views*, 34 *Loy. L.A. L. Rev.* 1361, 1366-67 (2001) (introducing "Call To Action" and papers from the National Summit on Improving Judicial Selection). In fact, we might be moving in the other direction: "Back in 1906, Roscoe Pound, a scholar at Harvard Law School, started a campaign to have judges appointed. When he spoke, eight in ten American judges stood for election. Today, the figure is 87%." *The Election of Judges: Guilty, Your Honour?*, *THE ECONOMIST*, July 24, 2004, at 28-29; see also *My Judge Is a Party Animal*, *THE ECONOMIST*, Jan. 1, 2005, at 20.

"[The recent] loss of reform momentum has led groups like the [ABA] to seek ways of improving existing modes of selection rather than transforming them, at least in the short run." G. Alan Tarr, *The Judicial Branch*, in 3 *STATE CONSTITUTIONS FOR THE 21ST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM* 85, 99-100 (G. Alan Tarr & Robert F. Williams eds., 2006) (footnotes omitted). How telling it is that in 1988, Professor Tarr wrote of the movement toward "merit" systems. G. Alan Tarr & Mary Cordelia Porter, *State Supreme Courts* in *STATE AND NATION* 61 (1990). Many lawyers and good-government advocates have a strong preference for "merit" systems, but "the evidence supporting [the claims for its superiority] is largely anecdotal." Tarr, *The Judicial Branch*, *supra*.

Efforts to end contestable elections have failed for a generation (except for one Missouri county in 2008, Green County, the state's

largest jurisdiction that had not already adopted "merit" and retention). Not only are such efforts running into reality, they actually impede judicial reform by distracting from feasible steps that will reduce the problems in contestable elections, e.g. (a) steps to inform voters about the candidates and the differences between judges and other elective officials, and (b) establishing Campaign Conduct Oversight Committees. See notes 32 and 46 *infra*.

8. William C. Bayne, *Lychard's Candidacy, Ads, Putting Spice into Justice Race*, *COMM. APPEAL* (Memphis), Oct. 29, 2000, at p. 1 (available on Westlaw at 2000 WLNR 5193408).
9. And campaigns changed. Later one judge wrote (when the California Judges Association [CJA] surveyed incumbents about campaigns): "Having learned my lesson from the 1978 up-rising, [this time] I hired a campaign manager immediately . . . . I won easily (63% to 37%) in spite of a libelous brochure put out by my opponent the week before the election. . . . It is easy for the Deputy District Attorneys, who have everything to gain and nothing to lose, to oppose an incumbent judge who has everything to lose." The CJA held sessions on campaigning. Political consultant Joseph Cerrell, who, after 1978, worked in several hundred California judicial contests, said this: "Our senators have a political operation for use in retaliation. For the most part, judges are standing naked in the political process not knowing what, when or how to do anything." Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 *J.LAW. & POL'Y* 57, 68-69, 71-72 (1985).
10. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 3 *M.S.U.-D.C.L.L.REV.* 849, 850-51 (2001).

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and talk by former United States Supreme Court Justice Sandra Day O'Connor. In September, she addressed "more than 200 elected officials and guests of the Iowa Bar Association . . ." Praising Iowa's judicial-selection system, she also made this powerful statement:

Justice [David] Souter and I both look at the Court as the one

safe place where a person can have a fair and impartial hearing . . . and we have to keep that. [We] have to address the pressures being applied to that one safe place . . . to have it where judges are not subject to outright retaliation.<sup>25</sup>

It's not clear, though, that Justice O'Connor's effort had any lasting impact.

Strikingly absent or severely limited were efforts by national organizations with the mission of supporting judicial independence. Four are relevant, the largest by far being the American Bar Association, but the ABA understandably leaves local action to state and local bar associations. And what any state or local bar will do depends on who happens to be the leadership at the time and whether anyone can be recruited who has time available and the relevant experience. The Iowa Bar was

alert to the situation, did come into action, and their action was substantial, but not more; it aimed entirely at explaining voting in a retention election.

Three other national organizations focus fully or largely on judicial selection systems. Newest is the Colorado-based Institute to Advance the American Legal System, started in 2006 and working with Justice O'Connor. In 2010, it gave its attention to a Nevada ballot proposition to replace their contestable election system with a "merit" appointment and retention system. Nevada twice before had defeated similar proposals, and 2010 saw it defeated a third time, this time with 58% voting against the proposal.<sup>26</sup>

The oldest of these three national organizations, the American Judicature Society, founded in 1913 and by coincidence based in Iowa, is legally barred (as a 501(c)(3) tax-exempt entity) from election activity, but its regular education programs included efforts and events in Iowa; how much, if at all, those programs affected the election seems impossible to say. Last, the most active of these entities, networked and well funded (mainly by George Soros's Open Society Institute), is Justice at Stake, which has "partnered" with an array of other organizations such as the ABA, the National Center for State Courts, the League of Women Voters, the American Judges Association, and many reform groups. Like the American Judicature Society, Justice at Stake is barred from election activity; its president wrote an op-ed about voting in retention elections, published online in the *Denver Post*.<sup>27</sup>

Would the justices and judicial independence have been aided if more visitors like Justice O'Connor had come to Iowa,

11. Roy A. Schotland, Comment, 61 LAW & CONTEMP. PROBS. 149, 150 (1988).

12. See Margaret Ebrahim, *The Bible Bench*, MOTHER JONES, May-June 2006, at 54-57, 81-83. "Many on the religious right felt that the third branch of government should be as accountable to the public as the legislative branch was. . . . 'There's nothing the matter with [judgeships] being political,' Schlafly told the *Kansas City Star*." *Id.* at 57.

13. The political consultant said, at a gathering of lawyers and business leaders in Kansas City shortly after the election, that "some of these [anti-judiciary] groups just want a scalp to hang on the wall." Scott Lauck, *Missouri's Non-Partisan Court Plan May Be Best for Cole County*, MISSOURI LAWYERS WEEKLY, Nov. 20, 2006 (available on LexisNexis). See also John DeMoor, *Debate Reveals Rock 'Em, Sock 'Em Future of Judicial Politics*, MISSOURI LAWYERS WEEKLY, May 28, 2007 (available on Westlaw at 2007 WLNR 26581789). The source of funding was a New York real estate figure chairing Americans for Limited Government, which also supported Colorado and Montana ballot propositions to limit judges. See Lauck, *supra*; Tim Hoover, *National Dollars Find, Defeat Circuit Judge*, KANSAS CITY STAR, Dec. 4, 2006, at p. A1 (available on Westlaw at 2006 WLNR 20875926).

One observer believes that the consultant hoped to scare judges into hiring political consultants to stave off such attacks in the future. Other observers believe that the challenge was supported by major figures in the political branches who were displeased with recent court decisions and wanted to send a message to the judiciary.

14. Email to author, November 17, 2010.

15. See Richard G. Lee, *Behind the Fall of Iowa's Judicial Gods*, online posting at "Dallas Blog," available at <http://www.dallasblog.com/201011231007382/guest-viewpoint/behind-the-fall-of-iowa-s-judicial-gods.html>.

The *Los Angeles Times* has reported that Gingrich "[l]ast fall . . . played a key behind-the-scenes role in an unprecedented—and successful—campaign to remove three Iowa Supreme Court judges . . . helping secure \$200,000 in seed money for the effort. . . . 'It wouldn't have happened without Newt,' said David Lane, executive director of Iowa for Freedom, the organization that led the campaign. 'Newt provided strategic advice and arranged the initial seed money . . . which is what got everything started.' The money came from an anonymous donor whose contribution was arranged by Gingrich, Lane said. Robert L. Vander Plaats, chief spokesman for the judicial campaign, said the former speaker provided key strategic advice." Tom Hamburger & Matea Gold, *Gingrich Courts the Religious Right*, L.A. TIMES, p. 1 (available on Westlaw at 2011 WLNR 4124524).

That report was followed by two others which said the sum was \$150,000. Tom Witosky, *Gingrich Group Gave to Effort Against Justices*, DES MOINES REGISTER, March 16, 2011, at p. A1 (available on Westlaw at 2011 WLNR 5152390); and AP, *Gingrich Funnels \$150K to Iowa Groups That Defeated Justices by Way of Aide's Committee*, WASH. POST, March 15, 2011.

16. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). The decision drew national attention at once, see e.g., Teddy Davis & Ferdous Al-Faruque, *Iowa: The Gay Marriage Mecca?*, ABC NEWS, April 3, 2009, available at <http://abcnews.go.com/Politics/story?id=7253244&page=1>.

such as former chief justices from other states who might have drawn upon experience from judicial elections in various selection systems? Such speakers might produce press coverage and meet with many groups in many locations—should that be tried in a coming election? Experienced observers in several states say that judges cannot be effective supporters of other judges; voters are likely to view the effort as self-protection. The most effective supporters are likely to be respected former high officials or other persons who enjoy strong public regard, like some media stars and the voters' local members of the state legislature. (But former chief justices or justices with campaign experience might be invaluable sounding boards for candidates in contests.)

Many state bar associations and others do have “rapid response” plans and people ready to defend courts when judges are under inappropriate attack. Looking backward, ought responses to have been launched in Iowa shortly after the *Varnum* decision came under attack? More to the point, ought the next similar situation draw more early-response attention than this one did?

Two post-election gatherings in Iowa have looked back on the election usefully. In December, two focus groups met to discuss the election. According to one observer's report:

We heard a lot of “It may have been the ‘right’ decision based on the Constitution, but I just don’t like it. So I voted them out.” Repeatedly we saw voters unable to understand the differences between what judges do and what non-judicial elective officials do. This basic civics gap as it relates to the difference between the

three branches of government . . . was cavernous.

Another observer said this:

[What] may be most important for us going forward—several expressed a frustration with the fact that they didn’t know who the justices were, how they became justices, how they arrived at their decision, what gave them the right to make the decision, etc. There appears to be a great desire for more information and more education. . . .

**“We heard a lot of ‘It may have been the “right” decision based on the Constitution, but I just don’t like it. So I voted them out.”**

A third observer said that one focus group participant commented along these lines:

Much as I oppose the court’s decision, I know so little about judges that I shouldn’t be allowed to vote on them.

And in February, at a University of Iowa Law School panel discussion about the election, Justice Michael Streit, one of the three denied retention, said that “politicians demanded judges follow the popular vote, instead of ruling on the law. . . . They kept saying it was the ‘will of the people’ but who are these people?”<sup>28</sup> Very differently, Vanderbilt Law School Professor Brian Fitzpatrick said that “the only question is whose politics

For a thorough and learned analysis of the decision, see Todd Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. (forthcoming May 2011); see also Chase D. Anderson, *A Quest for Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review after Perry*, 60 DUKE L.J. 1413, 1431-39 (Of the four states’ supreme court cases, “Only the Iowa court had a developed evidentiary record on which to base its conclusions. . . . The Iowa court’s opinion contained the strongest reasoning.”).

17. The extremely high participation in voting on retention was attributable in part to the fact that the races for Governor and for U.S. Senator were not at all close, so attention in media coverage and otherwise focused on the retention contest.
18. All spending data are from the NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, INDEPENDENT EXPENDITURES IN IOWA TOPPLE THREE HIGH COURT JUSTICES, Jan. 10, 2011, available at <http://www.followthemoney.org/press/ReportView>.
19. See note 3 *supra*.
20. See Lynda Waddington, *Anti-Judge Bus Tour Dwarfed by Pro-Retention Rally*, THE IOWA INDEP., Oct. 28, 2010, available at <http://iowaindependent.com/46337/anti-judge-bus-tour-dwarfed-by-pro-retention-rally>.
21. See Pettys, note 16 *supra*, at 74. One pastor “has a prayer that he recites as he campaigns . . . , ‘Dear God, he says, ‘please allow the IRS to attack my church, so I can take them all the way to the U.S. Supreme Court.’” Bryan Ray, *Iowa Pastor Preaches Politics to Oust 3 Justices Who Backed Gay Marriage*, USA TODAY, October 13, 2010. A “Project Jeremiah 2010” pledged free legal support to the churches, see Jason Hancock, *Second Iowa Pastor Takes Aim at*

*Judges*, THE IOWA INDEP., Oct. 7, 2010, available at <http://iowaindependent.com/44775/second-iowa-pastor-takes-aim-at-judges>.

22. After the National Institute report (see note 18 *supra*) on the Iowa spending, a late contribution raised the Fair Courts’ total by \$6,500. See email to author from Linda Casey of National Institute, Feb. 15, 2011.

Almost no funds were raised before mid-October. The State Bar contributed \$50,000 (10/18); Iowa Academy of Trial Lawyers \$50,000 (mostly 10/20); Polk County Bar Assoc. \$13,124 (10/29); American Bd. of Trial Advocates \$5,000 (10/18); Iowa Defense Counsel Assoc. \$5,000 (10/27); AFSCME \$25,000 (10/18); Human Rights Campaign Equality Votes \$25,000 (10/25); Fairness Fund \$25,000 (10/13); Midwest Capital Group Inc. \$20,000 (10/18); also, one individual contributed \$50,000 (10/12). Information provided author by Fair Courts for Us Committee; and see Fair Courts’ filings on Independent Expenditure by an Organization, Iowa Ethics and Campaign Disclosure Board.

Iowa’s campaign finance disclosure, administered by the Ethics and Campaign Finance Board, seems a case study in how to frustrate any use of such information. For example, the “Independent Expenditure” reports filed by the Fair Courts committee have cover pages with total sums that differ substantially from the accompanying detailed pages; the columns of donors’ names are mostly unmatchable with the columns of contribution amounts; many donors are listed without contribution amounts, etc.

23. Transcribed for this article.
24. The ad was produced hastily because funds became available only very shortly before the election. In my view, the ad would have

**Judicial elections . . . are fundamentally different from other elections because the judge's job is so different from nonjudicial elective officials.**

are driving the judiciary. Judges make law and law is what judges say it is. The Constitution isn't clear. Doctrines are invented by judges and those aren't clear. They reach rulings based on their opinions. It's inevitable." The election was summed up by panelist Kathie Obradovich, political columnist for the

*Des Moines Register*: "[T]he campaign on one side was about education of merit selection process and about the courts, and the other side was politics. The politics won. But the conversation needs to keep going forward. . . ."29

**SOME OPINIONS BASED ON THE 2010 IOWA ELECTION**

**THE ELECTION ITSELF**

Let's begin with some thoughts directly about the Iowa election itself.

First, should the justices have campaigned? They did not, and most knowledgeable observers have faulted them for this. But I do not, for two reasons: Implying absolutely no view of these justices, I stress (as I wrote several years ago) that many fine judges are not political in any sense—no surprise—and many of them do not fit comfortably into a political role.<sup>30</sup>

been beyond criticism if only one sentence were changed, replacing "you should not fire the good referees on just one call," with something like this: "We all know that some calls look bad to some people and look good to other people, but we know we need referees who are neutral; we can't rely on any other kind."

25. Tyler Kingkade, *Sandra Day O'Connor Visits, Admires Iowa Court System*, IOWA STATE DAILY, Sept. 8, 2010, available at [http://www.iowastatedaily.com/news/article\\_1a95721e-bb9b-11df-9116-001cc4c03286.html](http://www.iowastatedaily.com/news/article_1a95721e-bb9b-11df-9116-001cc4c03286.html); and see Dahlia Lithwick, *Cheap Seats: How Sandra Day O'Connor Got Drawn into the Gay-Marriage Debate in Iowa*, SLATE, Nov. 13, 2010, available at <http://www.slate.com/id/2267160>.

26. Valerie Miller, *Ballot Measures Die on Election Day*, LAW VEGAS BUSINESS PRESS, Nov. 15, 2010. The State Bar president, who had supported the measure, said, "A lot of work went into this. But this was such a negative election. Voters said 'no' to everything." The final result did show support had continued rising: a July poll found 27%, an October poll found 37%. Doug McMurdo, *Question 1*, LAS VEGAS REVIEW-JOURNAL, Oct. 30, 2010.

Nevada voters had rejected the change in 1972 and 1988. AM. JUDICATURE SOC'Y, Chronology, note 7 *supra*. In fact, Nevada's final result in 2010 showed more support for changing the selection system than the last generation had won in other states. Such changes have been consistently defeated for the last generation.

South Dakota voters in 2004 defeated, two to one, a proposal to have their trial judges selected in the same "merit"/retention system as their appellate judges, instead of continuing to run in contestable nonpartisan elections. (However, since 1982 only 21

Study of the "judicial personality" shows, as one would expect, how different it is from the "political personality."<sup>31</sup> Also, campaigning may have undermined, at least somewhat, the fundamental position at stake: that the judges' job is different from the jobs of other elected officials.<sup>32</sup>

Second (and entirely separate) is the question whether it is appropriate to vote against a retention candidate because of one decision. The *raison d'être* of retention elections is to reduce politics in judicial selection or retention. Whatever the system of selecting and/or retaining judges, they are accountable for their neutrality and professionalism; if they are to carry out the rule of law, they are not to be removed from office for a decision that is unpopular but, in their view, is called for by the facts and law as they understand it.

Never is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge is campaigned against because of a stand on a single issue or even in a single case.<sup>33</sup>

Of course, voters, if empowered to vote on judges either in contestable elections or on retention, obviously can vote on whatever grounds they wish. But power doesn't equal rightness. Judicial elections, whatever the type, are fundamentally different from other elections because the judge's job is so different from nonjudicial elective officials. The differences are clear first from the array of state constitutional provisions about judges—e.g., all elective states give judges terms that are stunningly longer than any other elected officials' terms.<sup>34</sup> But

of 109 judgeships had been contested.) The trial judges themselves had earlier been sharply divided about their selection system, but for 2004 were unanimous in favoring the change, and the legislature was only one vote from unanimity in putting the proposal on the ballot. The opposition was summed up by one city official: "This proposal is against Motherhood and Apple Pie, it's un-American." Despite an active campaign supporting the change, it lost after being opposed in a major speech by James Dobson, whom the *New York Times* called "the nation's most influential evangelical leader." Russell Shorto, *What's Their Real Problem with Gay Marriage*, N.Y. TIMES SUNDAY MAGAZINE, 34, 41 Jun. 19, 2005. Dobson was in South Dakota campaigning against Senator Daschle. A few years earlier, Dobson had discovered at an Alabama rally for their Chief Justice Roy Moore (active advocate of the Ten Commandments), what Dobson called "the depth of popular resentment of liberal court decisions." As several supporters of the change said after losing, "the people won't give up their vote."

As in South Dakota, Florida's appellate judges are in a "merit"/retention system and here too the trial judges face contestable (but rarely contested) nonpartisan elections. In 2000, Floridians (yes, Virginia, there were other races on the Florida ballot that year), defeated a proposal to put their trial judges in the same system as their appellate judges. The change was defeated in every circuit with the affirmative vote averaging 32%, and in every county with the affirmative averaging 26% (the most favorable was 39%). The change had been supported by the Florida Bar, which like the ABA and most state bar associations had been urging such a system for decades.

retention elections are not only different, they are unique.<sup>35</sup> To say that it is appropriate for voters in retention elections to toss out a judge because of a decision, defies the history of the retention system's adoption and its design to avoid the advocacy, heat, and range of choice that can come with competing candidates.<sup>36</sup>

Let me be explicit that despite my deep disagreement with those who opposed the Iowa justices' retention, I respect their honesty. They disagreed with one decision that that court had made, their disagreement was the undeniably clear basis of their opposition, and they took advantage of an opportunity to make the justices account for what they had done.

One cannot deny that voters can use their opportunity to vote any way they wish. Nor do I fault advocates and activists who say that even for judges, elections are a proper method of accountability. But it is entirely different for academics or other supposedly detached observers to endorse that view. To ignore the differences between what judges do and what nonjudicial elective officials do is unthinking or hyper-simplistic.

Nonjudicial elective officials thrive or lose by their reading of the support they can secure by adopting positions and promising to promote them, then by how well they perform in implementing the promises. For any judge—even United States Supreme Court justices—“hot-button” issues are rare (even at the Supreme Court, only a minute fraction of their decisions). For most trial judges, such issues are non-existent. But decades of experience show that when there is organized opposition to a judge, it is rarely honest. Last year, for example,

Illinois Supreme Court Justice Thomas L. Kilbride was opposed by pro-business interests unhappy with his voting to overturn a statute capping medical malpractice damages; but the opposition's TV ads focused on his record in criminal cases to portray him as “soft on crime.”<sup>37</sup> Similarly, a recent West Virginia case ended in the United States Supreme Court because of the extraordinarily large independent spending against an incumbent by the president of a company with major litigation coming before that court; that opposition had focused entirely on the incumbent's role in a case about a child-abuser.<sup>38</sup> In cases like those, it may well be that most voters in fact *agreed* with the decisions that actually led to the incumbent's being opposed, but were misled by sophisticated campaigning that relied on selling what was easy to sell. One of our wisest judges summarized the reality of judicial elections:

**Let me be explicit that despite my deep disagreement with those who opposed the Iowa justices' retention, I respect their honesty.**

Every judge's campaign slogan, in advertisements and on billboards, is some variation of “tough on crime.” The liberal candidate is the one who advertises: “Tough but fair.” Television campaigns have featured judges in their robes slamming shut a prison cell door.<sup>39</sup>

To oppose a judge because of her or his decisions and then

And in 1987 in Ohio, a ballot proposition for change lost two to one and in 80 of Ohio's 88 counties, despite more than \$400,000 spent to support it by the State Bar and League of Women Voters. The opposition included the Democratic and Republican parties and was funded with over \$300,000 from the Ohio AFL/CIO, who ran TV ads that have been the basic theme in all these contests over change: “Don't let them take away your vote.” John D. Felice & John C. Kilwein, *Strike One, Strike Two.... The History of and Prospect for Judicial Reform in Ohio*, JUDICATURE, Dec.-Jan. 1992, at 193.

27. Bert Brandenburg, *Look at Whole Record of Judges Before Voting*, DENVER POST, posted Oct. 27, 2010, [http://www.denverpost.com/guestcommentary/ci\\_16439027](http://www.denverpost.com/guestcommentary/ci_16439027)

28. Justice Streit's “who are these people[?]” goes right to the difference between election voting on one hand, law on the other. Our constitutional republic is founded on and functions through three branches and a specified process of enactment and enforcement of laws. If the prescribed deliberative, representative, and accountable process is not followed, we risk replacing law with some people's passions—perhaps widely shared and perhaps not, perhaps long-lasting and perhaps not.

One of the Federalist Papers' most memorable statements addresses precisely this difference:

As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for

measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next. No. 63 (Madison), ABA Classics Series (2009), at 362-63.

29. Trish Mehaffey, *Retention Election Came Down to Politics vs. Law*, EASTERN IOWA NEWS NOW, posted Feb. 3, 2011, <http://eastern-iowanewsnow.com/2011/02/03/retention-election-came-down-to-politics-vs-law/>.

30. However, since the justices were within five percentage points of being retained, even modest campaigning might well have changed the result.

Justice Streit (see n. 28 above) said this in February: “. . . I think that judges, if they face real opposition, cannot sit back quietly and wait for voters to do what is right. I think they're going to have to campaign, and that means . . . to raise money. They're going to have to tell people, I will be fair and impartial, but please, I need \$100,000.” See DES MOINES REGISTER Staff Blogs, *Ousted Justice: Judges Likely to Need Election Campaigns*, <http://blogs.desmoinesregister.com/dmr/index.php/2011/02/03/ousted-justice-judges-likely-to-need-election-campaigns/>.

**[T]he Iowa event has several different impacts: one . . . is a likely chilling effect on future decisions in many states . . .**

campaign with attacks based on unrelated and seriously misleading claims, dishonors the election process and distorts accountability.

A third and last opinion is about whether the supporters of the justices should have relied on defending “fair and impartial courts” or should have also defended the decision

on gay marriage. Organizations as well as individuals have strong and conflicting views about what message should be used. My own view is that *both* messages should be pressed (probably by different groups or advocates) because the messages will draw different supporters. As the late Henry Hyde, a long-time Congressman from Illinois, once said, “Politics is a game of addition. You start with your followers and bring in new ones, constantly broadening the circle . . .”<sup>40</sup>

#### WHAT OF IT? THE IMPACT OF THE ELECTION

One distinguished professor of constitutional law has suggested that this Iowa experience may have no lasting negative impact on the rule of law:

What happened in Iowa cannot help but give a temporary chill to other courts when faced with such a highly charged political issue as gay marriage. . . . But this sort of thing happens episodically, creates a stir and then dies down. Some accountability is not a bad idea.

The rule of law is not in danger because of this one election.<sup>41</sup>

That is an optimistic view, but with all respect, it is misleadingly superficial. First, it fails to note that the Iowa event has several different impacts: one, as noted, is a likely chilling effect on future decisions in many states; another is the probability, as I note below, of a significant increase in challenges to judges in many states and in all kinds of elections; and last is this: At least until the Iowa event’s impacts do “die down,” we will suffer from some indeterminate number of fine lawyers who would make fine judges, and fine judges who are coming up for reelection or retention, who decide against being on the bench because of the job’s newly increased insecurity. Second, while of course “[t]he rule of law is not in danger because of this one election,” neither did one presidential assassination put American politics in danger. But even if some disasters die down after brief stirs, several reasons suggest that the Iowa event is likely to have lasting impact. One cannot predict just how much, but it will be enough to matter, enough to cause substantial concern.<sup>42</sup>

Because:

1. Judicial elections (until a few in recent years) were always either completely quiet or, even if lively, had no impact on other elections. Starting with Missouri’s 2004 challenge to a justice’s retention, where much of the motivation was to increase turnout in *nonjudicial* elections, the tail has begun to wag the dog. That is, judicial elections become lively because they can be used as a tool to affect *nonjudi-*

The new justices appointed in 2011 to fill the three vacancies will campaign in 2012. Jens Manuel Krogstad, *New Justices Will Campaign When Facing Retention Vote*, DES MOINES REGISTER, Mar. 24, 2011. “The justices said that they prefer not to campaign . . . but that they learned a lesson from last fall’s successful campaign that ousted three justices. . . . [Justice] Waterman said he didn’t like seeing the retention vote and selection process become politicized with outside money. However, he said the events provided a good springboard to discuss the importance of the judiciary.”

31. For the 1998 study by the presiding judge of the San Bernardino trial courts, see my *Six Fatal Flaws*, 86 DENV. U. L. REV. 233, 242-45 (2008) (“Elective Campaigns and the Judicial Pool”).
32. For a powerful example of voter-aimed material that “It’s Simple—Judicial Elections are Different,” see the Maryland Judicial Campaign Conduct Committee’s brochure, available at <http://www.mdjccc.org/index/html>.

Consider how different is the judge’s job:

[O]ther elected officials are open to meeting—at any time and openly or privately—their constituents or anyone who may be affected by their action in pending or future matters, but judges are not similarly open; nonjudicial candidates [are free to] seek support by making promises about how they will perform; [o]ther elected officials are advocates, free to cultivate and reward support by working with their supporters to advance shared goals; other elected officials pledge to change law, and if elected they often work unreservedly toward change; other elected officials participate in diverse and usually large multi-member bodies; other elected incumbents build up support through “constituent casework,”

patronage, securing benefits for communities, etc.; almost all other elected officials face challenges in every election; [and last, fundraising by judicial candidates is uniquely constrained]. Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 34 IND. L. REV. 701, 716-17 (2002).

- Reflecting such differences, “The judicial role is most likely more constrained by normative expectations than any other in American politics.” James Gibson, in the latest of his important studies on the effect of judicial campaigns on the legitimacy of courts, *Judges, Elections, and the American Mass Public* (forthcoming), at 8.
33. ABA TASK FORCE REPORT, see note 2 *supra*, at 6.
  34. Conference of Chief Justices, amicus brief in *Republican Party of Minnesota v. Kelly*, 122 S.Ct. 643, at 6 (2002).
  35. Indeed, a strong argument has been made that a requirement of “elections” is not satisfied unless there can be competing candidates. Brian Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008).
  36. Judge Duane Benton of the 8th Circuit Court of Appeals, who speaks with the special authority of having been on Missouri’s high court, described retention elections this way:

“The strongest advocates of retention elections intended that they would be nearly meaningless. [He then quoted a 1980 article that retention elections] were designed to allow qualified judges to serve long terms with only a modest amount of direct accountability. Indeed, those who developed the concept preferred life tenure, but they acquiesced to political realities and allowed the public an opportunity to remove judges in extreme circumstances. Clearly removal

- cial races. That seems bound to recur.
2. A second incentive to challenge judges emerged in Missouri's 2006 challenge to a trial judge: the combination of a consultant eager for a client, with even a single deep-pocket individual ready to crusade against judges. Some combination of a consultant and a deep pocket seems bound to recur.
  3. Iowa brings a new incentive: any politician who is either anti-judiciary, or willing to be, can secure enough support that if the effort wins or almost wins, she or he gains. Vander Plaats' having led the Iowa effort to such success has made him a major figure, probably the state's number three Republican after Governor Terry E. Branstad and Senator Chuck Grassley.<sup>43</sup> There are bound to be copyists, even if Vander Plaats fails in his current effort to sell a book about Iowa's 2010 event.<sup>44</sup>

### WHAT TO DO? STEPS TO TAKE TO REDUCE THE LIKELIHOOD OF MORE ATTACKS ON JUDGES

What to do? Here, I merely list a few key possibilities worth consideration:

**Outreach**, which should be year-in, year-out and should include "audience multipliers" like Access TV, local radio, and local newspaper coverage.<sup>45</sup>

**Bench/Bar/Media** meetings at least annually, as well as columns in local newspapers by chief justices and/or other justices.

**Campaign Conduct Committees**—unofficial and with members who are representative, diverse, and distinguished.<sup>46</sup>

- was perceived as the exception, not the rule." Benton, *Comments on the White, Caulfield & Tarr Articles*, 74 MO. L. REV. 667, 669 (2009).
37. "Kilbride was portrayed as soft on crime in visceral radio ads that featured actors portraying rapists and murderers. . . . [T]he acknowledged aim of the Illinois Civic Justice League was to dump a judge it sees as unwilling to stop large jury awards given to plaintiffs in malpractice and other negligence lawsuits." Monique Garcia, *State Supreme Court Justice Retention Battle*, CHI. TRIB., Nov. 2, 2010.
  38. See *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).
  39. Hans A. Linde, Comment, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1988). For examples of judicial candidates' "tough on crime" ads, see Task Force on Selecting State Ct. Judges, Citizens for Indep. Cts., *Choosing Justice: Reforming the Selection of State Judges*, in UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 77, 101-02 (2000).
  40. Peggy Noonan, *Where the Leaders Are*, WALL ST. JOURNAL, Feb. 18, 2011.
  41. Mark Curriden, *Judging the Judges*, 97 ABA. J. 56, 58 (2011) (quoting NYU professor Barry Friedman).

The facile "Some accountability is not a bad idea" is foolish. "Accountability" on a lightning-rod issue arises only if the judge voted *against* the preference of people able to organize and secure funding. This turns justice into gambling with one side holding a marked deck. Consider, e.g., *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (upholding a public school pupil's right to refuse, on religious grounds, to salute the flag and overruling a contrary 1940 decision); *Gideon v. Wainwright*, 372 U.S.

**Readiness of the Bar** and other supporters of fair and impartial courts, especially including the general counsels of key organizations and corporations.

One notable observer of the Iowa events said that part of the reason it happened was that it was so hard to know the opposition was so substantial. When I mentioned that to a state chief justice who is unusually savvy about politics, he was dismissive, saying that to wait until one knows is to lose, and that the only sound course is to be ready, working constantly to help the public understand the role of the courts and how different is the judges' job from the jobs of other elected officials.

The impacts of an event like the Iowa voters' rejection of their justices are of three types, all severely harmful. I do not prioritize among these, but:

1. Judges everywhere (not only in elective states, but any judge who is not nearing the end of her or his career) will be unable to avoid thinking about possible popular reactions, if they have before them a high-visibility case or issue.<sup>47</sup>
2. Sitting judges, as well as lawyers willing to serve on the bench and who would be fine judges, will be more likely to stop or avoid such service because of the unpredictable insecurity that is too likely to flow from their doing their

**The impacts of an event like the Iowa voters' rejection of their justices are of three types, all severely harmful.**

- 335 (1963) (upholding a right to counsel in felony trials and overruling a contrary 1942 decision).
42. Whether popular reactions against a few highly visible decisions will remain episodic, or instead will fuel long-standing efforts to politicize judicial elections, I cannot predict. Examples of such efforts in recent years: Colorado voters rejected an effort to impose term limits on judges. And in Kansas, local voters rejected efforts to return to contestable elections by replacing "merit"/retention systems, and the legislature has rejected efforts to change the statewide "merit"/retention system for appellate judges.
- As of March 8, 2011, "legislation has been introduced in at least eight states to radically restructure or eliminate long-standing merit selection systems." Interestingly, in Iowa "a host" of bills ended in committee, "thanks in part to the vocal opposition of a broadly-based bipartisan coalition of legal and non-legal organizations." American Judicature Society press release, Mar. 8, 2011.
43. This does not mean that people like Vander Plaats are taking over the state party. In fact, Governor Branstad's appointments to fill the three vacancies created by the election are traditional for Iowa: two experienced judges and one notable practitioner, all with reputations for ability and neutrality. See Jerry Krogstad, *Branstad's Supreme Court Choices*, DES MOINES REGISTER, Feb. 23, 2011.
44. For a full-page profile of Vander Plaats, see Kerry Howley, *The Pizza and the Power*, NYTIMES MAGAZINE, Mar. 3, 2011. He is now a full-time executive of the FAMILY LEADER ("they've consigned the 'I' to lowercase to emphasize the individual's submission before God," id.), "a social conservative advocacy group started this week in Iowa," which is sponsoring presidential candidate

job.<sup>48</sup> And though insecurity will not worry many of the best people, they will be worse than worried by the likelihood that their colleagues will be unduly concerned about possible public reactions to high-visibility decisions. One chief justice said this of the Iowa election impact: “[T]his may be the most significant and long term damage from the election. There is no way to gauge how many attorneys decide to ‘pass’ on the judicial career because of this.”<sup>49</sup>

3. Courts will be less able to serve in the indispensable manner in which they have served since we adopted our constitutions—as the bodies that are as insulated from public passions as we can make them, to review the acts by officials in other branches in order to assure protection of individual rights and the rule of law.<sup>50</sup>

Although I do predict that the Iowa election is likely to mean more trouble in judicial elections, this is not predicting more defeats. Just as in California after the 1978 challenges to

trial judges,<sup>51</sup> there is every reason to believe that justices, judges, and their supporters will be more ready to meet (and head off) challenges. A hallmark of judicial excellence is deliberativeness, but that doesn’t include unresponsiveness.



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forums in the coming months in which “several prospective candidates have agreed . . . to participate . . . .” Jeff Zeleny, *Conservative Gathering to Test G.O.P. Hopefuls*, N.Y. TIMES, Feb. 9, 2011.

45. The Florida Bar has outstanding materials (and training materials) for lawyers’ and judges’ outreach presentations, see the Benchmarks Program of the Judicial Independence Committee of the Florida Bar, <http://www.floridabar.org/judicialindependence>. The ABA also has excellent materials available, see ABA Standing Committee on Judicial Independence’s Resource Kit on Fair and Impartial Courts, available at: [http://www.americanbar.org/groups/justice\\_center/judicial\\_independence/resources/resource\\_kit\\_on\\_fair\\_impartial\\_courts\\_lub.html](http://www.americanbar.org/groups/justice_center/judicial_independence/resources/resource_kit_on_fair_impartial_courts_lub.html).

For a remarkable picture of the number and types of outreach programs, see the more than 50-page annual COMMUNITY OUTREACH PROGRAMS AND CONTACTS: SUPERIOR COURTS, published by California’s Administrative Office of the Courts.

Surely illuminating is the fact that the Iowa court has just begun its first-ever outreach efforts. See William Petroski, *State’s Justices to Take to the Radio Airwaves*, DES MOINES REGISTER, Mar. 15, 2011; and see Krogstad, n. 30 *supra* (“[T]he justices will for the first time travel around the state to hear arguments.”).

46. See David Rottman, *Conduct and its Oversight in Judicial Elections: Can Friendly Persuasion Outperform the Power to Regulate?*, 21 GEO. J. LEG. ETH. 1295 (2008); and see the National Center for State Courts’ website on such committees, <http://www.judicialcampaignoversight.org>.
47. “You cannot forget the fact that you have a crocodile in your bathtub,” said former California Justice Otto Kaus, referring to controversial cases at election time. “You keep wondering whether you’re letting yourself be influenced, and you do not know. You do not know yourself that well.” D. Morain, *Kaus to Retire from State Supreme Court*, L.A. TIMES, July 2, 1985. “Should a judge look over his shoulder [when making decisions] about whether they’re going to be thrown out of office? I hope so,” asserted Tennessee’s Governor after helping to deny retention to Justice Penny White in 1996. That quotation is the very opening of David B. Frohnmayer [long-time elected Attorney General of Oregon and then president of the University of Oregon], *Who’s To Judge?*, 58 OR. SR. B. BULL. 9, 9 (1997).

48. We cannot overemphasize that the entire point of work on judicial selection is to protect and promote the suitability of the lawyers who will enter and stay on the bench. There will never be a shortage of lawyers eager to be judges, but the size and caliber of the pool changes. To go on the bench already involves a greater—and steadily increasing—loss of income. “Judges’ Pay: A Chasm Far Worse Than Realized, and Worsening,” the title of my 2007 article, 82 IND. L.J. 1273, has been downloaded incomparably more than any other product of my 26 years’ work on judicial elections and selection.

49. In my view, whether the worst impact of the Iowa event will be what it does to affect who seeks judgeships, or what it does to reduce judges’ protection of constitutional rights in unpopular matters, is hard to predict. But which is worst doesn’t matter: both are destructive departures from our constitutional order.

50. I must confess error in being focused on the election and failing to think about other developments now doing severe damage to our justice system. Iowa’s new Chief Justice Mark Cady, in his State of the Judiciary Address in January, discussed two topics: the recent election and the role of courts in constitutional review, and the Iowa courts’ recent budget cuts. On the latter, he included this:

“In addition, our work has grown in the past few years as a direct result of cuts in services for treating abused and neglected children and troubled youths. The following observations of Juvenile Court Officer Paul Thompson of Marshall County best describe this situation:

“The front end kids are no longer being served, or if they are, not as well. We . . . get these kids later when their problems are more firmly entrenched. . . . The schools and the police look to us for help and we are unable to provide much assistance due to the lack of manpower and funds. Due to funding problems, kids sit in detention or shelter way too long while waiting for appropriate residential treatment. . . . [I]t seems like we are having less success when they come back from placement. The system is certainly broken . . . [and] the long term effects will show up years down the road.” (Jan. 12, 2011), at 5.

51. Text at note 9 *supra*.